

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

APRIL 9, 2019

2:37 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; April 9, 2019.)

THE COURT: Good afternoon. Please have a seat. We're here for a status conference in Donna Curling, et al. vs. Brad Raffensperger, Civil Action File Number 1:17-CV-2989.

Good afternoon, Counsel. We have some changes in faces and some not. But just for purposes of this hearing at least, why don't we have everyone introduce themselves anew or for the first time.

MS. CHAPPLE: Good afternoon, Your Honor. Catherine Chapple from Morrison & Foerster for the Curling plaintiffs. With me today is David Cross also with Morrison & Foerster and Adams Sparks with Krevolin & Horst.

THE COURT: Very good.

MR. BROWN: Your Honor, Bruce Brown for the Coalition plaintiffs. And with me today is Marilyn Marks, the director of the Coalition, and Cary Ichter.

THE COURT: Very good.

MR. RUSSO: Good afternoon, Your Honor. Vincent Russo with Robbins Ross Alloy Belinfante Littlefield for the state defendants.

MR. TYSON: Your Honor, Bryan Tyson of Taylor English Duma for the same defendants as well.

MR. BELINFANTE: Good afternoon, Your Honor. Josh Belinfante of the Robbins Firm for the state defendants.

1 THE COURT: Very good.

2 MR. MILLER: Carey Miller with the Robbins Firm also
3 for the state defendants.

4 THE COURT: Very good.

5 MS. BURWELL: Good afternoon, Your Honor. Kaye
6 Burwell, Fulton County.

7 MR. LOWMAN: Good afternoon, Your Honor. David
8 Lowman, Fulton County.

9 MR. GERMANY: Good afternoon, Your Honor. Ryan
10 Germany. I'm from the Secretary of State's office.

11 THE COURT: Thank you.

12 All right. What I have here is really just
13 essentially the Coalition plaintiffs' status report and nothing
14 from anyone else. And I had read the Coalition plaintiffs'
15 status report. And I tried to familiarize myself to the extent
16 I can on my own without the assistance of counsel with the
17 status of the legislation and any issues that are raised by the
18 RFP.

19 I wondered if the state defendants could apprise me
20 of the timelines involved at this juncture. Just give me a
21 little sort of overview of that. Thank you.

22 MR. RUSSO: Yes, Your Honor. So in terms of the time
23 frames, Your Honor, as you are aware, you issued an order at
24 the end of last year telling the state to get moving,
25 so-to-speak --

1 THE COURT: Right.

2 MR. RUSSO: -- and that, you know, as time continued
3 forward, if the state wasn't moving -- wasn't moving along that
4 their arguments regarding lack of resources and difficulties
5 changing to an all paper ballot system would weaken. The state
6 took that to heart. And as you are aware, House Bill 316,
7 which is now Act 24, has been signed into law. That bill
8 changes a number of areas of the Georgia Election Code but with
9 respect to this case specifically the DRE issue and allows the
10 state to implement new voting machines and a new voting
11 system -- a back end system also that will address -- it
12 addresses the concerns of the Court with the outdated machines.

13 It allows for a paper ballot to be printed from the
14 machine and then to be scanned and counted, similar to an
15 optical scan paper ballot. It is just that the voter puts --
16 inputs their votes on a touch screen device. And there are a
17 number of reasons why the state -- well, the legislature -- and
18 it is indicated in the bill why the legislature did that. And
19 some were for ADA compliance issues. There are some aspects of
20 it that prevent overvotes and will notify the voter also if
21 they forget to vote in a race.

22 But the point being is that has been signed. The
23 Governor put \$150 million in his budget to buy new machines.
24 That is obviously a large piece of being able to acquire new
25 voting equipment. And then as Your Honor mentioned, the

1 state -- Secretary of State has issued an RFP, which is the
2 procurement process.

3 We have certified copies of the legislation.

4 THE COURT: Good. Because I printed one that was
5 not, clearly. I just have the marked-out version that looked
6 like it had been adopted.

7 MR. RUSSO: Well, there is -- there are a lot of
8 aspects to the bill that are not relevant here today. And we
9 can go through those --

10 THE COURT: Thank you.

11 MR. RUSSO: -- for you. We have copies for you-all.

12 THE COURT: You've given me two identical copies; is
13 that right?

14 MR. RUSSO: They should be identical.

15 THE COURT: I just was going to have one for
16 Ms. Cole.

17 Why don't you give that one to Ms. Cole so that she
18 has it. Then we'll give it back to Harry. Okay.

19 The RFP was issued when?

20 MR. RUSSO: The RFP was issued in January, I believe.
21 I'm trying to find where I think I have that written down. It
22 was a little out of order than what I prepared for.

23 THE COURT: Sorry.

24 Yes?

25 MS. CHAPPLE: Your Honor, March 15.

1 THE COURT: All right. March 15.

2 MR. RUSSO: Thank you. Here we go. So that's right.
3 So March 15. And proposal responses are due April 23rd. Under
4 the RFP, the timeline for the initial valuation is -- of the
5 proposals is two to three weeks after the close, which closes
6 April 23rd. So sometime around May 7 through 14, the state
7 will go through --

8 THE COURT: Just one second.

9 To members of the audience, I assume we want you-all
10 to be able to sit. Some of you may -- there are a few seats
11 here. And if there are members of the press, you can sit in
12 the jury box.

13 UNIDENTIFIED SPEAKER: May I move this?

14 THE COURT: I think that -- Mr. Martin, do you want
15 to just oversee the moving?

16 **(There was a brief pause in the proceedings.)**

17 THE COURT: All right. Go ahead.

18 MR. RUSSO: So the final valuation and the RFP time
19 frame is in June -- late June, 18 through the 25th, sometime
20 around there, eight to nine weeks after the close. And then
21 the state will finalize the contract terms through early July.
22 And the notice of award will be issued sometime in mid-July.

23 Now, this is -- so around July 12 through 19. The
24 RFP is set out where it is -- the timing that everything occurs
25 is based on the weeks after the close. So the dates I'm giving

1 you are just our own calculation of that.

2 THE COURT: All right.

3 MR. RUSSO: It is expected that by early August the
4 implementation will begin. As you are aware, the state is
5 going to have certain elections this year that they will run
6 the new machines and the new voting system in. There's HB316.
7 I'll just call it HB316 even though it is an act now. HB316
8 provides for the state to have a pilot program for at least ten
9 counties -- but it could have more -- to test -- for testing
10 purposes of the machines.

11 So actual elections will be run this year on
12 ballot-marking devices. And the full implementation is set to
13 be done by the end of the first quarter of 2020. So that is
14 the deadline, and the -- the legislation requires vendors to be
15 able to meet those deadlines. So it is not just in the RFP.
16 It is something that, you know, is expected.

17 THE COURT: Are any of the ten jurisdictions where
18 they are going to be voting ones with large populations?

19 MR. RUSSO: I don't think the jurisdictions have been
20 selected yet.

21 THE COURT: But I just don't know whether -- what
22 counties or cities are planning to have votes in the next year
23 in 2019.

24 MR. RUSSO: That's right. So 2019 is an off year for
25 elections. There are no state or federal or regularly set

1 elections this year. There are some municipalities --
2 municipalities in Georgia have to have elections in
3 odd-numbered years under the law. If you're an Atlanta voter
4 like me, then you won't vote until 2021. So some are not this
5 year, but some are. Then counties can have special elections
6 for SPLOSTs, and those -- the state has set a time frame
7 throughout the year that counties can hold those to avoid --

8 THE COURT: I'm just trying to determine is there
9 actually going to be anything that would be the equivalent of a
10 large jurisdiction with a large turnout that would happen in
11 the next -- in 2019 before we run into using this in the
12 primary season when you can anticipate a large turnout.

13 MR. RUSSO: So, Your Honor, for planning purposes
14 with the RFP, there are counties in here, such as Fulton and
15 Gwinnett, that will be part of Phase 1, which will be the first
16 rollout. It looks like Fulton will have 200 ballot-marking
17 devices for that phase. And --

18 THE COURT: So there's an anticipated election in
19 Fulton in 2019?

20 MR. RUSSO: I suspect that Fulton will have
21 elections, but I'll have to defer to Fulton County for sure.

22 MS. BURWELL: I didn't -- there are some potential
23 SPLOSTs in 2019, Your Honor. Then we would also have some --

24 THE COURT: Some potential SPLOSTs -- SPLOSTs
25 elections you mean in terms of authorizing expenditures?

1 MS. BURWELL: Yes.

2 THE COURT: All right. And what type of vote would
3 you anticipate based on your prior -- is there one actually
4 anticipated, or are you just saying there is a potentiality for
5 that?

6 MS. BURWELL: I think it is just a potential. I
7 don't know of it being actually scheduled.

8 MR. RUSSO: But, Your Honor, I can tell you we have
9 looked at past years to see how many counties had SPLOSTs in
10 this cycle. And the estimate that the state gave us is about
11 115 counties could have elections this year.

12 THE COURT: All right. So then you are going to roll
13 into -- and those would typically be in November or not?

14 MR. RUSSO: November.

15 THE COURT: In November. Then you are rolling into
16 the primary season, which is in February?

17 MR. RUSSO: Well, next year will be a little bit
18 different than last year because we'll have a presidential
19 preference primary in Georgia, which that is never held -- it
20 is always on a different date from the regular primary, which
21 we'll have.

22 So it is not set yet. But it is usually held
23 sometime in March. It could be April. It really just -- it
24 really just depends and starts to get into some of the rules
25 around how parties -- the national parties will work, I think.

1 THE COURT: All right.

2 MR. RUSSO: But there will be that statewide
3 election, and then there will be a regular primary, which the
4 State of Georgia will have a U.S. senator on the ballot next
5 year. So there will be at least one statewide race in Georgia
6 at the primary. Then, of course, we move into the November
7 elections.

8 So that is the general schedule with 2020 to be --
9 all the 2020 elections to be using ballot-marking devices or
10 whatever the state ends up getting. That is one of the issues
11 we obviously have here is what -- you know, what machines is
12 the state going to buy. We don't know. That process is
13 ongoing. But the plaintiffs have filed a status report today
14 as you are aware that, you know, we --

15 THE COURT: I know you didn't agree with it. And I
16 sort of put you on the spot by making you go first. But I just
17 wanted --

18 MR. RUSSO: I'm happy to continue if you would like
19 me to.

20 THE COURT: But I wanted to get a bigger picture of
21 things. And, you know, I'm happy to allow you to respond to
22 what they have to say. But I had read it, so I was trying to
23 cut to the quick in that way.

24 But what I don't really understand from the
25 plaintiffs that might be helpful in terms of your responding to

1 it is -- it is a fulsome status report the plaintiffs provide.
2 But I'm not sure how you are seeking that -- seeking to proceed
3 here, and I'm not sure I completely understand also -- and this
4 is, I guess, a question I would like to pose to counsel while
5 you are up. And then I'll let you come back again though.

6 I mean, it seems to me the essence of what -- of the
7 concern that the plaintiffs have articulated -- I mean, they
8 have a lot of different concerns saying that a different system
9 would be far better. And I understand what their argument is
10 there. But that we still have an inherently hackable,
11 difficult, not auditable system is their argument, as I
12 understand it.

13 If the vote is being counted off of the bar code
14 and -- which may not be, in fact, the same or auditable by the
15 voter as a facsimile of what the vote is that -- so as I
16 understand it, the vote is not being counted off of the actual
17 machine that you place your vote on. That is not -- it is not
18 like a DRE in that sense, which does the actual calculation.

19 The calculation is done from the bar code --

20 MR. RUSSO: Well, it is --

21 THE COURT: -- or is it --

22 MR. RUSSO: At the end of the day, the calculation is
23 similar to the calculation with an optical scan ballot. You
24 stick it in the machine. The machine reads information off of
25 it. It just reads it differently. With an optical scan

1 machine, there are various infrared components to how the
2 machine reads the paper and where it reads the smudge marks for
3 folks who filled in a -- bubbled in a vote for somebody or for
4 yes or no on a ballot question.

5 With the BMD, the difference is the individual walks
6 up to the machine, the machine pulls up their ballot for the
7 race that they are eligible to vote for --

8 THE COURT: Right.

9 MR. RUSSO: -- similar to a DRE. They go through.
10 They pick who they want to vote for. The machine doesn't let
11 them vote for two people unlike bubbling in two people. The
12 machine also lets you know if you didn't vote for someone
13 unlike with the paper ballot.

14 And then when you are done, you hit, you know, submit
15 and it prints out a piece of paper. Different vendors have
16 different kinds of paper that they print out. But at the end,
17 it is a piece of paper that is a paper ballot. And that paper
18 could have a QR code on it or it could have a bar code.

19 THE COURT: What is a QR code?

20 MR. RUSSO: It is -- well, I'm not --

21 THE COURT: I know. I have seen that word too. I
22 didn't go --

23 MR. RUSSO: I'm barely able to use Facebook.

24 THE COURT: What is a QR code?

25 MS. CHAPPLE: It is that little picture, sort of

1 square sort of thing with a different -- you may have seen it.
2 Brands have it on signs, and you can scan it. But it is a
3 little bit like a -- you know --

4 MR. RUSSO: Yeah. I mean, all of these, at the end
5 of the day, it gets put in. So you have the paper ballot. You
6 can go through and make sure that it had your choices that you
7 voted for, and it gets put in to a machine.

8 And this is kind of a big -- I'm giving you a fairly
9 high level view of how it all works. But it goes in the
10 machine, and the machine counts it. Then you have the paper
11 ballot that can be used for a recount or for an audit.

12 Now, an optical scan ballot is -- looks like a
13 provisional ballot. Right. I don't know if you have ever seen
14 one. But it looks like a paper ballot. You bubble in. And
15 you can vote for two people. You can vote for nobody. Or you
16 could accurately bubble in all of the votes.

17 Then you take it. You review if it is correct and
18 put it into the scanner. The scanner then has -- it basically
19 reads -- reads the ballot. Right. It uses -- it uses various
20 things such as timing marks surrounding the edges of the
21 printed ballot.

22 At the end of the day, there is some technology
23 obviously being used to read all of this -- all of these
24 ballots that are being put into the ultimate machine that reads
25 it. So that is -- that is the difference.

1 When you audit, if you audited an optical scan
2 machine, you might -- or you did a recount, you might take all
3 the ballots, look and see what the vote count was that was
4 recorded, and rerun them. You could look at them individually
5 and say, yep, he voted for, you know, George Washington or not.
6 And that is the same as what happens with the ballot-marking
7 devices. It looks -- they might look a little different. But
8 at the end of the day, somebody has a piece of paper. If they
9 want to do a recount or you wanted to audit every single vote,
10 you go through every single piece of paper and see did the
11 machine -- the machine had ten votes for George Washington. Do
12 we have ten pieces of paper that have George Washington printed
13 out on them as the vote the individual was casting?

14 So, again, it is somewhat high level. But it is
15 auditable. To say it is not I don't think is being accurate,
16 quite honestly.

17 And, you know, Your Honor, there are other issues
18 with the status report that were raised such as the
19 unreasonable burden for voters to check accuracy of a long and
20 complex ballot. And, you know, in fact, I think that the
21 plaintiffs probably summed up the whole case here right on
22 Page 7 where it says it is an unreasonable burden on voters to
23 require them to undertake the difficult process to check the
24 machine accuracy for a long and complex ballot.

25 But, Your Honor, they are going to have to check the

1 ballot of the same length for all the same reasons no matter
2 what. It is quite unbelievable that -- the stage that we're at
3 in this case. The plaintiffs' position is that the ballot that
4 comes out of a ballot-marking device is now so long that a
5 voter is just not going to check it all but if somebody is
6 bubbling in a vote that the voter is going to then check all --
7 check all of those votes before they put it into the optical
8 scan machine and further underlining some of the -- some of the
9 issues here.

10 There is the note -- Footnote 7 in the status report
11 that plaintiffs have argued throughout this status report,
12 which we don't -- you know, this status report and Mr. Brown's
13 letters we do not think are substitutes for an amended
14 complaint, by any means. But putting that aside, you know,
15 Footnote 7 says that the plaintiffs, you know, have argued that
16 ballot-marking devices are unconstitutional but for the most
17 vulnerable members of society, those with disabilities,
18 ballot-marking devices are okay.

19 I can't figure out, you know, how we get to the point
20 of someone who is a disabled individual can use a machine that
21 the plaintiffs claim puts an unconstitutional burden on the
22 right of other voters to vote but it is okay for an individual
23 with a disability.

24 So those are a few of the high level issues we see
25 here.

1 THE COURT: I just want to go back to my question
2 though, which is -- which I posed to you. My understanding is
3 that it is the bar code at least on three of the five
4 certified -- potentially EAC certified systems that might apply
5 that is the basis of the counting of the vote and that -- I
6 mean, that is sort of -- that is what I was trying to get
7 clarified.

8 I realize that two of the systems do not use that.
9 They do it more like when we do bubble in tests as kids, and
10 they are just OCRing in it. If I put down George Washington --

11 MR. RUSSO: There are the little dots that the
12 machine is reading.

13 THE COURT: Is reading, right. But whatever you put
14 down and you are seeing -- when you verify what the results are
15 on the ballot on two of the systems, if it is George
16 Washington, George Washington is going in; whereas, what they
17 are saying -- at least according to the report of the OSET
18 Institute -- and I'm just trying to understand whether this is
19 your --

20 MR. RUSSO: I think it is somewhat of a distinction
21 without a difference, quite honestly, Your Honor. I mean, at
22 the end of the day, you have a computer reading code on a piece
23 of paper. It may be reading little dots that are doing -- that
24 has been OCRed in. It may be a QR code or a bar code. Or -- I
25 mean, the lines go up on the side of the Scantron and how an

1 optical scan -- it is not the exact same technology. But there
2 is a process. Right. And it is still requiring a computer to
3 read something. And if there are issues with the computer, all
4 of these -- every single -- every single one of these, even
5 what they are proposing, has a computer between the piece of
6 paper and the vote being tabulated. There isn't a system where
7 everybody is just counting paper ballots. It would take -- it
8 would be over by the time you got done going through all of the
9 paper ballots.

10 So that is just not -- it is not accurate to say that
11 one system doesn't -- doesn't involve a computer on tabulating
12 votes and the other one does or that a bar code is at the end
13 of the day any different than an OCR'd scan of a ballot. It is
14 all just the underlying technology.

15 MR. CROSS: Your Honor, could I ask: Does counsel
16 have the ability to read the bar code that's attached as
17 Exhibit 4 to the Coalition's status report? If he can, just
18 read that to us as to what that says.

19 MR. RUSSO: It is the exact same thing. He couldn't
20 read what the optical scanner puts into the computer either. I
21 mean, we can all read what the person's whose name is being --
22 who is being voted for. One might have a bubble next to the
23 name. The other one might list out the person's name. But
24 just as I can't read what is on the OCR, you can't read what is
25 going into the machine or the optical scanner.

1 MS. CHAPPLE: Well, that is not true if what is --

2 THE COURT: All right. Well, I'm going to give you
3 an opportunity to address this.

4 All right. Well, let me hear from them, and then
5 we'll proceed. I'm just trying to understand what -- where the
6 plaintiffs are going. I understand that you want some
7 expedited discovery. But -- and I'm assuming because you-all
8 represented that you didn't come to any agreement that the
9 state defendants don't agree with that.

10 So I think before I have you sit down, let me just
11 sort of ask you globally where are you at in terms of you
12 received this, you had a conference, I gather, with plaintiffs'
13 counsel about their -- what they wanted to do in the status
14 report, and you disagreed with it. But I don't have any
15 information about what -- what your overall position is in
16 terms of where we go from now -- here, if anywhere.

17 MR. RUSSO: Well, Your Honor, at this point it
18 doesn't appear that the plaintiffs are intending to amend their
19 complaint. I think they are on the third one now. It might
20 actually be the fourth one. But who is counting? I did have
21 to go through the record to get prepared.

22 And, you know, Your Honor, we don't think that -- we
23 have never filed an answer. None of the defendants have filed
24 an answer. So to the extent they want to start discovery, we
25 need to go through the process.

1 And we think that 316 does moot their case. Their
2 case is about DRE machines. The relief they have requested is
3 about DRE machines. It is not about ballot-marking devices
4 anywhere. And we need to know what we're responding to and
5 what the allegations are and what they are claiming is
6 unconstitutional if we're going to go through this litigation
7 process. And, you know, we think even if Your Honor says that
8 the case -- maybe it is not moot yet because there are 2019
9 elections. We think there is a real question about whether
10 effective relief could even be granted as to the DRE machines.

11 And for the same reasons that you had concerns in
12 2018, I think that we would say that those concerns, you know,
13 are alive in 2019, especially with a 2020 presidential election
14 around the corner in which new machines will be used. And, you
15 know, every presidential election is the highest turnout.

16 So we don't think it is practical to implement what
17 they want in 2019. By the time we got around to it anyway, we
18 would be past the November elections and moving into final
19 implementation of the ballot-marking devices.

20 But then also with regard to the ballot-marking
21 devices, you know, I think there is a ripeness issue that needs
22 to be considered. I think that -- but even at very basic --

23 THE COURT: That it is not ripe yet?

24 MR. RUSSO: I don't think so. I think at a very
25 basic level though if they -- I mean, if they want to make a

1 facial challenge, I guess, to the statute, maybe they could do
2 something like that.

3 But I think at a very basic level we have got to have
4 a complaint that we know what they are alleging. As much as I
5 enjoy Mr. Brown's letters, those just -- it is tough for me to
6 go back to my client and tell them how we're going to respond
7 to this lawsuit when we get a different letter every week.

8 THE COURT: Okay. Thank you.

9 MR. RUSSO: Thank you.

10 MS. CHAPPLE: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MS. CHAPPLE: If it is all right with the Court, I
13 would like to show a brief slide show just to focus on our
14 arguments.

15 THE COURT: We just need to get the screen down.

16 I'm happy to look at the slide show. But why don't
17 you start before you go -- you are going to say it is not moot.
18 Is this going to tell me also why you don't need to have an
19 amended complaint?

20 MS. CHAPPLE: Yes.

21 THE COURT: All right.

22 MS. CHAPPLE: Yes.

23 THE COURT: Go ahead.

24 MS. CHAPPLE: So our case is really about violations
25 of the constitutional right --

1 THE COURT: Could we just dim the lights a slight
2 degree, Mr. Martin.

3 COURTROOM DEPUTY CLERK: Ma'am?

4 THE COURT: Just dim the ceiling light just a little
5 bit. Not all the way. But a little bit. All right.
6 Whatever.

7 Go ahead.

8 MS. CHAPPLE: We're having technical difficulties
9 over here.

10 THE COURT: Do you want Mr. Martin to give you a
11 hand?

12 MS. CHAPPLE: Yes. So at the heart of it all --

13 THE COURT: All right. Just one second so we don't
14 do everything in --

15 MS. CHAPPLE: I think it is the computer.

16 THE COURT: I'll give you a minute. All right.

17 MS. CHAPPLE: So really -- our case is really about
18 the violations of the constitutional right required when the
19 state subjects voters to an electronic system that is
20 unreliable, unsecure, and unauditable.

21 THE COURT: We're having technology just to mirror
22 the issues?

23 MS. CHAPPLE: Yes. We did this on purpose.

24 THE COURT: All right. It is going to distract me
25 thinking about trying to do two things at once here. So just

1 wait until you get your -- you are straightened out.

2 **(There was a brief pause in the proceedings.)**

3 THE COURT: All right.

4 MS. CHAPPLE: So the heart of our case is that an
5 electronic system that is unreliable, unsecure, and unauditable
6 violates the constitutional rights of Georgia voters. And the
7 system that is in place under HB316, Act 24, does not resolve
8 that because, first of all, the act does not prohibit DREs.
9 For at least a year, DREs will be in use in Georgia elections
10 until the state can implement the ballot-marking devices. And
11 the schedule that we heard the defendants talk about has
12 Phase 2, Part 2 completing at the end of March next year after
13 the presidential preference primaries are completed and after
14 the elections that will be taking place later this year.

15 THE COURT: What's Phase 2 versus Phase 1?

16 I'm sorry. Somebody in the back should just take
17 responsibility for the people standing outside the door. Okay?
18 Thank you.

19 MS. CHAPPLE: Phase 1 is, I think, another way to
20 put -- it is the pilot program. It is the ten counties.
21 Phase 2 is the larger implementation.

22 Phase 2 is broken up into two parts. The first part
23 has a small number of machines going to each county. I believe
24 it is five -- five BMDs and then a certain number of optical
25 scanners, a certain number of polls -- of EPolls. Then Part 2

1 of Phase 2 is the rollout of all of the machines across the
2 state. And the RFP, I believe, requests 30,050 ballot-marking
3 device machines.

4 THE COURT: Just for the general election? Not for
5 the primaries?

6 MS. CHAPPLE: That is for -- yes. That is Quarter 1
7 of 2020. I would also point out that that would be an
8 unprecedented use of ballot-marking devices. They are used
9 statewide in other states but only for accessibility for voters
10 with -- who need the accessible machines. They have not been
11 used in any other state as the only means of voting. It would
12 be something that no other state has done.

13 So to the extent that the schedule is set, it is not
14 based on anything that anyone else has done. And there's a
15 very high probability that that timeline will be pushed out
16 further.

17 But even if it is not, the timeline allows the DREs
18 to be in place for the next year. And so we feel that our
19 claims are not mooted as to the DREs or to the BMDs for the
20 following reasons. Specifically that like the DREs, the
21 ballot-marking devices have security vulnerabilities.

22 Dr. Wenke Lee -- we all talked about him during the
23 September hearing. He is the computer scientist who was part
24 of the Georgia SAFE Commission. He voted against the Georgia
25 SAFE Commission's final report because he said he could not

1 sign on to the use of BMDs. He said that BMDs contain at least
2 one vulnerability. That means the device may not accurately
3 report a vote or provide a correct receipt back to the voter.
4 And while the BMDs do have a paper record, because they may
5 have -- sorry -- they provide a paper record, but the paper
6 record may not be accurate.

7 And there are issues with whether voters will verify
8 them, first of all. Many of the machines actually ask a voter
9 if he or she wants to verify. And voters will say no and move
10 on. And so the opportunity to correct and to look at the
11 printout is gone. We talked a little bit about the bar code --

12 THE COURT: Let's put aside human motivation and lack
13 of diligence. Is it your understanding that if the individual
14 voter says, no, I don't that -- how is it -- what happens at
15 that juncture?

16 MS. CHAPPLE: So at that juncture, a printout would
17 be scanned. And depending on the type of machine as you talked
18 about with the defendant's counsel, three of the five types of
19 machines being proposed in Georgia have a bar code or a QR
20 code. And so even if the diligent voter tries to look and
21 looks at the names below the bar code, that is not actually
22 what will be scanned. That is not how the vote is recorded.

23 The vote is recorded off of the bar code. And there
24 is -- there is a non-zero chance that the bar code could have
25 been altered. And so even if the voter who was looking at the

1 list of names has no ability to read a bar code. And so
2 unlike -- unlike a voter-marked paper ballot where you are
3 verifying your vote as you cast it, you really cannot know what
4 is in that bar code to verify it. And that is the vote that is
5 recorded.

6 THE COURT: But my question was -- you said that
7 there was an option. And maybe this is speculation on the part
8 of plaintiffs that a voter would simply say, I've got to go to
9 work. It is 7:00 in the morning, and I have got to get going.

10 MS. CHAPPLE: Or I trust the machine.

11 THE COURT: Or I trust the machine. What happens
12 then in these five major systems?

13 MS. CHAPPLE: I believe the -- it is a little
14 speculation on my part. But I believe that what happens is
15 then the poll worker goes and scans it. I believe something
16 still comes out.

17 THE COURT: Somebody else does it?

18 MS. CHAPPLE: Yes, somebody else does it. The voter
19 doesn't just have to look at it any more. And I would say we
20 talk about voters who maybe aren't diligent. But there are
21 voters who are. And there are reasons why they maybe wouldn't
22 want to bring up an issue that they see on the ballot to have
23 to say to a poll worker --

24 THE COURT: All right. I understand all of this
25 human stuff. I'm trying to understand basic system issues at

1 this hearing -- that is all -- so that I can understand why you
2 are saying I don't need to have an amended complaint --

3 MS. CHAPPLE: Right.

4 THE COURT: -- and where you are going and what is
5 necessary. There may be -- I understand that there are all
6 sorts of other reasons that somebody who is a diligent voter
7 and comes to vote but may not be able to do this or want to.
8 But that is not really what is before me at the moment.

9 MS. CHAPPLE: Could I say one -- make one other point
10 that might be helpful? When we were speaking to our experts in
11 advance of the hearing, he gave me some context for what it
12 would look like if there was an issue. Typically if someone is
13 trying to influence the outcome of an election, they will
14 change one to two percent, a small number of the votes. They
15 won't change all the votes.

16 If you have -- you have voters who are looking for
17 issues, it may only be a few voters who see them at a precinct.
18 And even if they announce an issue to a poll worker, there is
19 nothing in this -- in this act that there is no -- there is no
20 system in Georgia to account for the errors or to look for
21 patterns in errors. And so there may not be a connection
22 regardless of all of that. So that is -- that is a further
23 reason that there is an issue here.

24 THE COURT: All right.

25 MS. CHAPPLE: So -- and along the same lines, the

1 act, House Bill 316, Act 24, does not address the other
2 security flaws in Georgia's system. The GEMS server that we
3 talked about in September is still in place. There is not --
4 there are no required changes to how ballots are loaded, the
5 protection of transmittal of the vote totals. Presumably the
6 Secretary of State's office could continue to transmit vote
7 totals via modem. There is no air gapping that is required.
8 It does not require any particular testing standards or
9 publication of results of testing. There's nothing required in
10 the bill of a reexamination or reapproval of devices after
11 changes to machines unless a change impairs a machine. But
12 impair is not defined. And --

13 THE COURT: Is there anything that is done regarding
14 the question of the integrity of the voting database and how it
15 interfaces with this system?

16 MS. CHAPPLE: No, Your Honor.

17 THE COURT: Well, are you seeking to challenge the
18 entire bill? What are you seeking here?

19 MS. CHAPPLE: We're seeking discovery into the system
20 that is in place in Georgia. We have been before you a few
21 times --

22 THE COURT: Well, the old system or the current -- or
23 the one that is being proposed as they begin to try to fly this
24 plane?

25 MS. CHAPPLE: The system is still in place for

1 another year.

2 THE COURT: All right. That's what you are seeking
3 right now --

4 MS. CHAPPLE: Right now.

5 THE COURT: -- is discovery on the old system and the
6 interface of the voter databases also with the way the old
7 system works?

8 MS. CHAPPLE: Right. Yes, Your Honor. And we're
9 seeking the same relief that we've been seeking, which is
10 voter-marked paper ballots.

11 THE COURT: All right. I understand that that is
12 what you want but -- the same relief. But it is kind of -- let
13 me just say, because of the focus of your -- of the Coalition
14 and their status report on the new system, which I wasn't clear
15 about that at all, so I'm not sure -- I know that the motion to
16 sever the plaintiffs has thankfully been dropped.

17 But are they seeking -- Mr. Brown, are you-all
18 seeking to challenge the GEMS system? I mean, the new
19 system -- not the GEMS system. But the new HB316 or -- is that
20 the focus of your efforts, or is that --

21 MR. BROWN: Your Honor, Bruce Brown. Your Honor,
22 we're -- the Coalition plaintiffs and the Curling plaintiffs
23 seek identical relief. And that is to the -- at the end would
24 be to permanently enjoin BMDs and DREs and that in advance of
25 that to preliminarily enjoin the use of voting systems that are

1 inconsistent with hand-marked paper ballots.

2 I think the question that you asked is do we need to
3 amend the complaint. We don't think we need to at least to our
4 third amended complaint. In Paragraph 169 -- and this is
5 Document 226 -- we allege that inherent in an individual's
6 fundamental right to vote is the right to participate in a
7 trustworthy and verifiable election process that safely,
8 accurately, and reliably records and counts all votes cast and
9 that produces a reliable election result capable of being
10 verified as true.

11 And, Your Honor, in the third amended complaint, that
12 complaint was also drafted and filed at the time that the state
13 in the 2018 legislative session was considering an earlier
14 version of House Bill 316, which also contemplated removing the
15 DREs with another inadequate system.

16 And so we would -- we would -- our position is that
17 it is included in the complaint. And as Mr. Russo alluded,
18 they have been very aware through our letters as to our
19 position of the unconstitutionality of the BMDs.

20 Now, there is a lot in the new bill, Your Honor, that
21 we are not seeking to enjoin. In fact, we have another case in
22 front of Judge May in which some of the relief -- I say we. It
23 is different -- I have another case. It is different
24 plaintiffs. But there have been some changes made, for
25 example, to the absentee ballot system that we're not

1 challenging.

2 What we are challenging and what we have been
3 challenging -- and it is the same for the DREs and the BMDs.
4 And there is a lot of different ways to explain it, Your Honor,
5 and different experts have different ways of articulating it.
6 We have tried to distill it down to the essence of the flaw in
7 these new systems. And that is, whenever you put a computer in
8 between the voter and the permanent record of that voter's
9 choice, you have an unconstitutional election system, at
10 least -- at least until they develop something that we have
11 never seen before.

12 And the reason for that is because there is no
13 independent source of the voter's intent. And so no matter how
14 you do it, you will -- it will still be flawed. Because you
15 are asking the voter to cast a ballot into this dark machine
16 and you don't know where it is going.

17 Now, it is correct that in our proposed solution,
18 which is used nationwide and which is recommended by all of the
19 experts --

20 THE COURT: We can get the lights up right now,
21 Mr. Martin. Can you just pull the lights up?

22 Thank you. Go ahead.

23 MR. BROWN: Mr. Russo is right. Our system -- the
24 proposal that we have sought from the beginning, like the DREs
25 and the BMDs, uses a computer. The difference is the

1 hand-marked paper ballot leaves an independent
2 noncomputer-generated record of the voter's intent.

3 The difference between what we're proposing and all
4 of these other systems -- it is not -- it is not -- it may
5 matter a little bit on the edges. But fundamentally it is not
6 exactly what computer creates what sort of artifact we have
7 from our computer. It is that the artifact is from a computer.
8 It could be a bar code. It could be those little silly squares
9 that you see on products. It could be a printout. But the
10 fact is it is created by a computer and therefore it is
11 fundamentally flawed.

12 With a hand-marked paper ballot, the voter does not
13 have to verify anything. He just -- he or she just makes the
14 choice once, fills it in, and puts it into the machine. It is
15 easily auditable because you have the permanent, independent
16 noncomputer-generated record of their vote.

17 And so our view is that any voting system that puts a
18 computer in between the voter and the permanent record of the
19 voter's choice is fundamentally flawed because -- and not be
20 audited at the end of the day. And if you put a computer where
21 there is a DRE or BMD, it is identical to us. If you put a
22 computer in between the voter and the record, you cannot audit
23 it at the end of the day.

24 You can with paper ballots. You cannot with these
25 computer systems because with the computer-generated artifact

1 all you are doing is comparing computer to computer. It is not
2 an audit. You are comparing two computer-generated applicants.

3 So that is fundamentally what our case has always
4 been. It may be that BMD -- it may be another sort of system
5 that does that. They are all flawed, and they are all flawed
6 in the same way. And so --

7 THE COURT: Well, if you have a precinct -- again
8 just so I understand this -- because we really are not here on
9 the merits at this juncture. But I just want to make sure I
10 understand your position totally.

11 If you have a printout of a vote that does not have
12 a -- it is not going to be considered by the square or by a bar
13 code -- and I understand what Mr. Russo's argument is -- it is
14 still going to go into the computer. And I guess you accept
15 that. You believe that he is right at that point maybe.

16 But at the end of the day, you will have -- at
17 precinct 105, you'll have potentially 1000 votes that you have
18 1000 printouts for. And if they -- won't you have a record
19 that way of what the actual vote is?

20 I realize there is all these human motivation things
21 and that some people will not have looked at their printout.
22 But other than the human motivation issue, won't you have, in
23 fact, a record of what people voted for in the old example that
24 it is -- it is George Washington versus Benedict Arnold?
25 You've got, let's say, 600 votes for George Washington and 400

1 for Benedict Arnold. Aren't you going to see that on those
2 paper printouts or not?

3 MR. BROWN: Your Honor, if you have, let's say,
4 1000 -- a stack of 1000 outputs from the computer-generated
5 output, for that to be auditable, all of the voters would have
6 had to check them accurately and completely. Because what the
7 audit does at the end of the day is take 100,000 of those and
8 if you are using, for example, a risk-limiting audit, which is
9 what Dr. Stark recommends, you make a lot of assumptions about
10 how many of those that you can choose. None of that works
11 unless that stack is deemed to be completely accurate.

12 With the hand-marked paper ballots, you have the
13 voter's choice. There is no verification needed. With these,
14 you are just guessing is it 50 percent of those were checked,
15 is it 60.

16 THE COURT: You mean checked by the voter?

17 MR. BROWN: That the voters verified them accurately.

18 THE COURT: Right.

19 MR. BROWN: And the experts that have looked at this,
20 the statistician and the cybersecurity people, looked exactly
21 at this issue that you raised, the exact same question. And
22 that is, if you have the printouts, isn't that the same as
23 having a stack of hand paper ballots? All of them say, no,
24 fundamentally it is not. Because what the stack has to be that
25 you are comparing is the real thing. Once you -- once you

1 introduce another variable in it -- and you don't know how many
2 people checked it or if they did so accurately -- then you
3 can't rely on it.

4 THE COURT: It is easier for me to understand the bar
5 code complaint, that you are not verifying the bar code or the
6 square, that the voter -- and that the legislation was intended
7 to allow the voter to actually look at their own vote and to
8 make sure that by looking at it and auditing it that that is
9 themselves -- that they have the opportunity to cast a vote
10 that they are confident about and they cannot verify the bar
11 code or the square. But you are telling me that it is -- that
12 really the definition of what your concerns are in part -- are
13 in large part, in fact, have to do also with the fact that the
14 voters simply don't -- there is a missing step there. They
15 don't know that -- the system can take advantage of the fact
16 that 60 percent of the people will never look at their
17 printout.

18 MR. BROWN: That is correct, Your Honor.

19 THE COURT: And those votes can be altered, and some
20 percentage of them will be altered or is subject to error?

21 MR. BROWN: Yes, Your Honor. The experts --

22 THE COURT: Is that what you are saying?

23 MR. BROWN: Yes. The experts -- and there are two
24 dozen of them who have opined on this exact system. They are
25 not -- they would agree that having only a bar code would be

1 particularly horrible. I think everybody would agree with
2 that.

3 But they were focusing their criticism on an output
4 that had also a human readable component to it. And so yes,
5 our objection really is more fundamental than just to the bar
6 code, which is a horrible idea. It is also to any artifact
7 that is not -- that is computer-generated for the auditability
8 reason.

9 Your Honor, there is also -- and I think -- I think
10 this could become actually a potent problem with the BMDs that
11 is a little bit different. And that is, there is no feedback
12 mechanism for incorrect votes. And these are some of the
13 things that we might get into in discovery.

14 But another flaw with ballot-marking devices is let's
15 say the voter gets the printout and says, wait a minute, I
16 voted for this one and it is blank or that is not all the votes
17 that I cast or I voted for Smith instead of Jones. What
18 happens?

19 THE COURT: Well, that is the same problem now. They
20 have to go to your machine and cancel the vote.

21 MR. BROWN: It is a problem. And what is the
22 feedback -- what happens to that machine? Does it keep on
23 getting used? Does the state use that information to say, wait
24 a minute, we have a problem.

25 The reason why it is an intractable problem, Your

1 Honor -- it is why these machines are just a bad idea from the
2 start -- is that there is no way of believing either the voter
3 that -- did he make it up? There is no record of what the
4 voter actually did. So if the voter says I voted for Smith,
5 the poll manager is going to say, honestly, I don't know
6 whether you did or not. The machine says you voted for Jones.
7 And there is no way to reconcile that, and there is nothing --
8 there is no feedback mechanism for that.

9 So our position -- and it is supported by science and
10 the logic of it -- is that these systems are fundamentally
11 flawed in the same way the DREs are, Your Honor.

12 In terms of the schedule of the case, we would seek
13 preliminary injunctive relief with respect to the DREs that are
14 going to be used in the meantime and then permanent relief at
15 the end of the day on both sets of the machines.

16 THE COURT: What is your understanding of when the
17 first elections are in the 2019 year?

18 MR. BROWN: Your Honor, we have tried to get a better
19 feel from the defendants on that, and I think they are doing
20 the best they can to anticipate it. They are held often, but
21 you don't know very long in advance sometimes --

22 MR. RUSSO: It is just SPLOSTs.

23 MR. BROWN: -- if they are actually needed. So they
24 are SPLOSTs. But there will be some in 2019 that we hope to
25 enjoin. Thank you.

1 THE COURT: Well, stay one more minute, and then I'll
2 allow Ms. Chapple to finish if she has something.

3 Why is this ripe, I mean, as to the new voting
4 equipment as opposed to the DRE machines that are currently in
5 use? And if the others are not ready to fly, I guess we'll
6 continue with the DRE machines indefinitely. But why is it
7 ripe as to the new machines? Because right now we don't know
8 what system they are going to use, what sort of -- and a host
9 of other questions.

10 I realize you say -- part of it is you say any
11 computer interface at this point is not trustworthy. But what
12 if I were to find or what if -- or what if the evidence
13 pointed, in fact, that at least on ballots, let's say, two of
14 the systems or three of the systems are more trustworthy
15 because they are not going to have a bar code, which you
16 describe as the ultimate --

17 MR. BROWN: Most offensive.

18 THE COURT: Most offensive to you -- to your clients
19 and most threatening. We don't know what is going to be
20 picked. We don't know much about the rollout. We don't know
21 much about the interface between these systems at this point
22 and the voter database, which was certainly an issue also.

23 So why is it ripe?

24 MR. BROWN: We believe that our -- the claims in the
25 third amended complaint of the Coalition plaintiffs embrace the

1 various options that the state might choose to deploy under
2 HB316. That is the first issue.

3 In terms of when relief, permanent or preliminary,
4 with respect to HB316 would be ripe and would be equitable,
5 that may have to wait until the state actually picks a
6 particular vendor because Your Honor would want to not make it
7 in the abstract I think but would want to be looking at a
8 particular deployment. So I would divide that into two
9 different questions.

10 THE COURT: All right.

11 MR. BROWN: But the relief for the old DREs is ripe
12 and urgent we would say. Thank you.

13 THE COURT: Is there something else you wanted to go
14 over without going through all of this? I mean, if there is
15 some particular screen you want me to focus on, then fine. But
16 since I have read your materials, I think --

17 MS. CHAPPLE: Yes. No. It is fine. I just wanted
18 to make clear that we agree with the Coalition plaintiffs as to
19 the claims against both systems and to the relief that we're
20 seeking. We think there is no need or reason for an amended
21 complaint because there is no new system in place. There is
22 still the same system that we had addressed in September of
23 last year. So that is it. Thank you.

24 THE COURT: Thank you.

25 MR. TYSON: Your Honor, just a few points for the

1 defendants on some of those issues. I think we have confirmed
2 that we don't have a ripeness -- we're not ripe yet on the
3 ballot-marking devices for sure. One of -- the whole point of
4 ripeness, quote, is to prevent the courts from premature
5 adjudication, from entangling themselves in abstract
6 disagreements. And I'm afraid we're in an abstract
7 disagreement at this point until there has been a selection of
8 a vendor.

9 The RFP outlines a lot of security issues that must
10 be included. It requires vendors to explain how they will
11 interact through air gaps with other systems, like the voter
12 registration database. It requires the use of modern
13 encryption technology for any purchases that are made. So
14 anything that is going to happen here, there is going to be a
15 different analysis of what the system ultimately is selected
16 and what is done.

17 I also heard from Mr. Brown, I think, two different
18 theories of what their complaint actually is going forward. It
19 either is all computers are bad between the voter and the
20 ballot or it is bar codes are the problem on these
21 ballot-marking devices. And I think that just goes to --

22 THE COURT: I don't know that they are different. It
23 is sort of like a higher level of horridness.

24 MR. TYSON: That can work. I think the real
25 challenge is in terms of a constitutional violation, you know,

1 does the constitution require only hand-marked paper ballots,
2 especially when we have issues related to disabled voters or
3 voters who have a limited reading proficiency who may need some
4 electronic device that can provide assistance to them. There's
5 obviously a number of interests that go into selecting the
6 right kind of system as the SAFE Commission looked at and tried
7 to analyze beyond just the security question. There's voters'
8 experience; the administrability; the fact that you have to
9 prepare and implement the paper ballot options as you discussed
10 in your order previously.

11 So I think in terms of the security piece, we don't
12 have a ripeness issue. We have a ripeness issue as to the
13 ballot-marking devices. We have a mootness issue in terms of
14 the DREs with House Bill 316. As Mr. Russo explained, the
15 state is moving as quickly as possible to eliminate these
16 machines. In House Bill 316, it specifically says as soon as
17 possible we have got to move away from these DRE units.

18 And as I know Your Honor is aware, that is not an
19 instantaneous process with the Government. We're moving as
20 quickly as we can on that process. And if there is a
21 limitation on the use of DREs right now, we're then going to be
22 pushing voters into a third system before we go back to an
23 electronic-based system in the first quarter of next year. So
24 I think that is another challenge in terms of the overall
25 direction we're going.

1 And --

2 THE COURT: You mean a third system being a hand
3 ballot?

4 MR. TYSON: A hand ballot system. Right. We have to
5 obviously train voters who have been voting on these machines
6 for over a decade now. They are familiar with electronic
7 voting. We would have poll workers. We have equipment we
8 would have to prepare and get and maintain for basically one
9 election and it takes resources away from the move to
10 ballot-marking devices and to a more modern voting system,
11 which is our end goal when this is all said and done.

12 THE COURT: Well, that is a good argument. But what
13 is the problem with having discovery about it, among other
14 things -- with all due respect to the technology companies, all
15 of us have been in the midst of major changes and conversions
16 and systems where things go bust and you have to wait for six
17 months to get things fixed. And we're talking about a major
18 election.

19 So I could conceive of easily that we could be moving
20 at all due speed and it is just not ready to fly or that -- and
21 that the DREs become the system of default and we're in the
22 same situation all over again. So why wouldn't, in fact, it be
23 a realistic step to, in fact, allow the discovery that is at
24 least at this point as to the DREs that is being sought and
25 that -- and I don't know what it is because I heard a lot more

1 in the status report about the -- in general about the new
2 system.

3 But I -- I'm grateful that the Georgia General
4 Assembly turned its attention to this. I certainly am. But I
5 mean, I'm just talking about reality and an individual's right
6 to cast a vote that is accountable and meaningful ultimately.
7 So you are on a short time frame, and their attention to that
8 is realistic to the extent that they don't want to be caught in
9 the same position all over again also.

10 MR. TYSON: I understand, Your Honor. I think I kind
11 of have two answers. One is a procedural process, and the
12 other relates to scope.

13 THE COURT: All right.

14 MR. TYSON: So maybe I can touch on both of those.
15 First, I think just from a procedural standpoint of where we
16 are in this case, there are a couple of issues remaining on the
17 motion to dismiss in your footnote about -- those may be
18 relatively easy to dispose of as far as res judicata and
19 collateral estoppel. I think those need to be disposed of. If
20 we're going to have a preliminary injunction motion briefing
21 process, we need to set a schedule for that.

22 We believe that given the mootness issues that have
23 arisen with House Bill 316 that there should at least be an
24 opportunity to brief and argue that as a jurisdictional matter
25 as a loss of subject matter jurisdiction here as to the DREs.

1 So that would be basically one additional motion to dismiss on
2 (b)(1) specifically for subject matter jurisdiction in light of
3 House Bill 316. Then we can get to an answer and then begin
4 discovery. That is the procedural answer.

5 But then I think we're left on the scope of discovery
6 question with what are we conducting discovery on. And if it
7 is limited only to the existing system, that's a different
8 question than if it is including kind of any computer that is
9 currently used in the election system.

10 The plaintiffs have already served on us despite the
11 stay of discovery a request for the full GEMS server database,
12 which the Georgia Court of Appeals has recognized the
13 disclosure of that database would cause a serious security
14 problem for elections.

15 When Judge Grubbs had a similar request from similar
16 plaintiffs in a case in superior court a few months ago, she
17 granted discovery that was allowing reports from the GEMS
18 database as opposed to accessing the full database. So I think
19 if we're going to get into discovery on the existing election
20 system, we are going to need to carefully cabin to make sure we
21 don't end up creating a security problem in the process of
22 trying to look at what the plaintiffs believe is a security
23 problem.

24 But we do not believe there should be anything
25 related to the ballot-marking devices or anything else, given

1 the fact that the plaintiffs' complaint is strictly about DREs.
2 And the only counts that are in existence right now are focused
3 only on DREs.

4 THE COURT: So you don't agree with Mr. Brown's
5 characterization of what the third amended complaint
6 encompasses?

7 MR. TYSON: Correct, Your Honor. Because when you go
8 to the counts that are still out there, they are all tied to
9 the use of DREs in elections. There was one count in the
10 second amended complaint from the Curling plaintiffs -- I
11 believe it was Count 3 -- that related to kind of a broader
12 question about election administration. But that was
13 specifically dismissed by those plaintiffs.

14 So of the counts that are still remaining, all of
15 them focus specifically on DREs, which again goes to our
16 concern about mootness and belief that that should be at least
17 briefed and addressed by this Court before we move into kind of
18 a full scale discovery and normal litigation track.

19 The reality is we're facing a situation where we know
20 DREs are -- there is going to be a point hopefully sooner
21 rather than later where DREs are not in use in Georgia. So if
22 we're not moot now, we're going to be moot in relatively short
23 order.

24 THE COURT: Well, the only thing is that they -- it
25 was about DREs. But it was also about the interface of these

1 machines with the voting database and its security as a whole.
2 So the DREs were you could say -- if you had a tripod, they
3 were certainly one leg. But they were not the only leg --

4 MR. TYSON: Correct.

5 THE COURT: -- that is being challenged.

6 MR. TYSON: Yes, Your Honor.

7 THE COURT: And I think that is partly what they are
8 relying on also is that it is -- and I realize that you and
9 your co-counsel are defending a number of different cases that
10 relate to an overlap of these issues, which is -- I recognize
11 that problem also. But it is -- the next system has to deal
12 with those -- you haven't changed the system for voter
13 information management, as I understand it.

14 MR. TYSON: Yes, Your Honor. And it is important to
15 note on that front that the RFP is seeking to get an entirely
16 new back end system to go with the election administration
17 side. So it is not just the ballot-marking devices. It
18 includes the election night reporting piece. I have the RFP if
19 you want it.

20 THE COURT: I probably do.

21 MR. TYSON: Yes. The background pieces. All of the
22 functions that go with the operation of the unit as well. The
23 state voter registration database, as I know you are familiar
24 with from other cases, there's specific language in House Bill
25 316 protecting provisional ballot voters and looking for those

1 pieces of if there are other paper registrations that were
2 missed and additional language in House Bill 392 that was added
3 that focuses on the security of the voter registration database
4 and bringing it -- a certification of its complying with modern
5 security standards somewhere in that language. So there is a
6 definite focus on all of these various pieces of the election
7 system of bringing the security up to the highest level we can.

8 THE COURT: Who is it, the Secretary of State's
9 office, or is it the new vendor that will be responsible for
10 management of the voter database?

11 MR. TYSON: So the voter database -- I'm going to
12 speculate a little bit. The voter database, eNet, is not
13 changing. The vendors for the new election systems have to
14 explain how their system will interact with eNet. So that will
15 still be maintained as the system that is going forward there.

16 The last point I'll make is just as to the
17 ballot-marking devices themselves just very briefly. When that
18 ballot comes out -- I know Mr. Cross said can you read the bar
19 code and you can't. But if you look below that, you see the
20 voter selections.

21 So in an audit, which the new legislation also
22 requires auditing of election returns and election machines,
23 you would be able to say I see 100 votes for George Washington
24 on the printouts. Does the machine also show 100 votes for
25 George Washington on its count? So the voter will have that

1 opportunity to see candidate, party, and race for each -- the
2 race that they voted in for each of those selections.

3 THE COURT: Right. I think the question in part is
4 will there be -- the audits that are anticipated under the
5 legislation, are they of the entire precinct or a portion of
6 the precinct or how -- can you explain a little bit more about
7 that?

8 MR. TYSON: And I'm sorry. Your Honor, I don't know
9 exactly what auditing process will be used. I know that the
10 legislation requires the Secretary of State to begin those
11 audits in 2020. And so there will be an auditing both of the
12 machines, the returns. It is going to be consistent with the
13 practices of election officials nationwide looking for --
14 looking for problems so we can identify those and get those
15 taken care of.

16 THE COURT: All right. On my simple question before
17 that there were 1000 votes cast in a Fulton County district --
18 precinct that perhaps has had issues before, one particular
19 one -- and I don't know what that one might be -- does it mean
20 you do -- do you have any notion of whether that means you're
21 going to -- the state would look at all of the votes cast or
22 just a portion of them?

23 MR. TYSON: So there are a number of different
24 auditing methods you can use I'm aware of in the election
25 process. There's the risk-limiting audit process that has been

1 referred to. There is a Bayesian audit. There's various kind
2 of pieces you look at.

3 So there is a -- I don't know the process that would
4 be used. But I would presume that you would look at a
5 particular precinct, look at all the paper ballots that were
6 generated by the ballot-marking devices, compare these to the
7 electronic returns, do the same thing with absentee ballots.

8 I was involved in an election in north Georgia that
9 is happening today. During a post-election audit, the election
10 official determined she was missing one vote. She had one more
11 check-in on her check-in list than she had ballots and located
12 that the ballot had been set aside at one point for some other
13 purpose.

14 So those are the kinds of things you would be looking
15 to identify: Are we missing a ballot? Are all of our numbers
16 between voter check-ins, votes cast -- are all those lining up?
17 We do rely at some point on the voter to be able to say this is
18 the ballot I'm casting, just like you would with the
19 hand-marked paper ballot.

20 THE COURT: And the auditing will only start in 2020
21 even though you are going to be running, I guess, some sort of
22 trial versions of this in 2019?

23 MR. TYSON: Yes, Your Honor. I'm certain that during
24 the testing and certification phase there will be a lot of
25 auditing happening with that. The statutorily-required audits

1 statewide would begin in 2020.

2 THE COURT: So how fast would you be willing or able
3 to actually file a motion to dismiss on mootness grounds?

4 MR. TYSON: I think we could file that very quickly,
5 Your Honor. Two weeks at most. Maybe a week if you need us to
6 turn it around that quickly.

7 THE COURT: All right. Now, let's say that is all
8 done and it is all in to me and we rule in six weeks and I find
9 it is not moot. At that juncture I'm not going to have another
10 motion to dismiss?

11 I mean, I'm not trying to say what is going to happen
12 here. But it just seems like we had a lot of opportunity. And
13 I had to deal with a lot of motions to dismiss. It seems like
14 as long as we have the 2000 -- the system going on right now it
15 is hard for me to see how it is moot.

16 It may not be of enormous significance at the moment
17 at least -- unless the new system isn't ready to go. But I
18 don't see quite how it is moot. So I mean, it just seems like
19 it is a lot of time and energy for naught, other than delay.

20 MR. TYSON: Yes, Your Honor. That is why I think we
21 think the cleanest way going forward procedurally would be to
22 have a new complaint -- amended complaint from the plaintiffs
23 about exactly what their claims are at this point. Then we
24 could focus in on issues you haven't already ruled on.

25 I know there were a lot of ruling on motions to

1 dismiss related to standing and other issues. I'm assuming
2 those are not going to be changing in an amended complaint.

3 But if we had an amended complaint that could tell us
4 what their claims are, we could really focus in on any other
5 motions that needed to be filed, if any, and then we would also
6 know what we're looking at in terms of the scope of discovery,
7 which is the other big challenge. If we're proceeding on the
8 current complaint, I'm just afraid we're going to have a lot of
9 disagreement about what the boundaries of that discovery might
10 look like.

11 THE COURT: So --

12 MR. BROWN: Your Honor --

13 THE COURT: If you had an amended complaint -- I'll
14 let you go in a second, Mr. Brown.

15 If you have an amended complaint, if I go in that
16 direction, then we don't have immediately a motion on mootness
17 grounds?

18 MR. TYSON: I'm not going to say we wouldn't, Your
19 Honor. I can't make you that promise. But we can at least
20 assess what the plaintiffs' claims are kind of in the current
21 moment, especially if there are existing or other exigent
22 claims that they would be raising unrelated to DREs and other
23 parts of the election system.

24 THE COURT: Okay. Thank you.

25 MR. CROSS: Your Honor, could I respond to just a

1 couple of points quickly?

2 THE COURT: Yes.

3 MR. CROSS: Your Honor, I confess I'm confused to
4 what their position is because they seem to be taking
5 irreconcilable positions. They began by arguing that the BMD
6 and the new legislation moots our case, and that's where they
7 have ended up. But much of Mr. Tyson's argument was that it is
8 not ripe. I don't see how they can take both. If it is -- if
9 it moots our case, then it is ripe and we'll deal with it in
10 discovery and we'll proceed as if it is in place.

11 But the reality is there is only one system that is
12 in place under law in this state. And there's no time period
13 in which that is going to move. Now, there is a proposed
14 framework. But everyone has to acknowledge, as Your Honor has,
15 that that could slip in any way. And the mootness motion they
16 want to file is going to be just as frivolous as the Eleventh
17 Circuit found their immunity arguments, which the Eleventh
18 Circuit found was, in fact, frivolous. And it is another delay
19 effort. Because all that is going to happen with -- the
20 mootness law, Your Honor, is unequivocal. Our case is only
21 moot if they have adopted something, it is in place, and it
22 resolves every conceivable claim and aspect of the relief that
23 we ask for.

24 If they are going to say it is not ripe, then they
25 have just eviscerated their mootness argument. What we would

1 say is let's focus on what is in front of us. Let's focus on
2 what is in place. That is the DREs. But it goes beyond that.
3 It is the GEMS server. It is the infrastructural and
4 systematic issues that are still in place, including the use of
5 modems.

6 So what we would propose is let's move forward on
7 this system. Let's get discovery going. They say discovery is
8 still stayed. Your Honor's stay was only based on the immunity
9 arguments. Once the Eleventh Circuit found those to be
10 frivolous, we thought the stay would be lifted. We assumed
11 that that was automatic. So discovery should proceed. There
12 is no basis to stay it.

13 And the other point, Your Honor, is the notion of an
14 amended complaint. They keep saying our case is about DREs.
15 Our case is not and has never been about DREs specifically.
16 Our case, as Mr. Brown described, is about using -- is having a
17 system that unconstitutionally is unreliable, unsecure, and
18 can't be audited.

19 Obviously we focused on DREs because those were the
20 machines in place. If they are now saying BMDs are going to
21 get ruled out and it moots our case, well, then that's the
22 focus of the case.

23 The point that I want to make clear is they cannot
24 have it both ways. It cannot be our case is moot because
25 there's something new but this something new isn't ripe and so

1 we don't get discovery and no one gets to talk about it. I'm
2 perfectly happy at this point to accept their argument that it
3 is not ripe. Let's stipulate to that and let's move forward on
4 the system in place. We'll move for a preliminary injunction
5 within the next few weeks. We'll get that on the same basis
6 Your Honor found before we should have gotten it. The only
7 reason we didn't, as we read Your Honor's order, was because we
8 just didn't have time for such a major election. That was
9 their sole objection was feasibility, couldn't do it by the
10 midterms. Their sole argument for proposing that is now gone.
11 It is off the table.

12 There is ample time to get a preliminary injunction
13 in place that deals with these DRE elections that are small
14 elections but still important. Because under the Constitution,
15 every election matters. Let's get that in place. Then they
16 can figure out what they are going to do with the BMDs. But
17 we'll have the relief that the voters of Georgia are entitled
18 to under the current system. And if they come up with
19 something better out of this new legislation, great. Maybe
20 that will moot our case a year from now. But that is a year
21 from now.

22 That is how we would proceed, Your Honor.

23 MR. RUSSO: Your Honor, just a real quick point of
24 clarification. Is Mr. Cross saying that the plaintiffs are
25 stipulating or agreeing that this case is not about

1 ballot-marking devices and changes --

2 THE COURT: Get to the microphone for the court
3 reporter to get an accurate transcript.

4 MR. RUSSO: I'm just trying to find out if Mr. Cross
5 is stipulating to this case not being about ballot-marking
6 devices.

7 THE COURT: I would have to say I didn't hear him
8 saying that at all. I think he was saying -- and he can
9 correct me if I'm wrong. It is still about that. But it is
10 not -- because these issues are not ripe in the sense that you
11 have not -- the state has not adopted which system concretely
12 is what I understood.

13 MR. RUSSO: Okay. Sure.

14 THE COURT: That any -- so that is what I understood
15 him to say.

16 MR. RUSSO: Okay.

17 THE COURT: Did you mean to say something different?

18 MR. CROSS: That is correct, Your Honor.

19 MR. RUSSO: So we should take when they refer to DREs
20 in the complaint to mean BMDs also?

21 THE COURT: I can't speak to that.

22 MR. CROSS: Your Honor, I would say read the
23 complaint holistically, which is what the law requires. And
24 what you find is arguments, claims, and legal theories that a
25 system that is not reliable, that is not secure, is not

1 auditable, that relies on electronic machines, whether we call
2 them DREs or BMDs, that is unconstitutional and the relief
3 we're seeking for is the same regardless of what those machines
4 are.

5 The ultimate position is there is only one system in
6 place across this state that is not BMDs. So why they are
7 talking about BMDs I'm not entirely clear. But, again, if they
8 are saying that is what is ruled out, judicial economy says
9 let's take discovery on both. But at the very least, let's get
10 relief on the system that is in place. And then they can get
11 their act together on whatever else they are going to roll out.

12 THE COURT: Well, I understand why you are willing to
13 put off the BMD issue in the sense of saying we don't know what
14 the system exactly will be, other than what is identified in
15 the RFP and in the legislation. And I understand the argument
16 as to the mootness and that it is not moot at this juncture.
17 And I tend to agree that the argument about mootness at this
18 point is not meritorious.

19 I will not forbid the state from making any argument
20 it wants to make. But I don't think it is meritorious when we
21 still are going to be using that system right now. And it
22 seems like we have gone through a lot to just be delaying on
23 that.

24 But I can't agree with the plaintiffs that you're not
25 going to actually have to amend ultimately your complaint here.

1 I understand why you say it is all connected and it is the
2 same -- it should be within the context of whatever the civil
3 action number here is, 17-CV-2989.

4 But we need to have the actual specific allegations
5 here. I mean, that is -- we moved to a system -- at least the
6 current status of American law is that we have more -- we rely
7 on more specific allegations. We don't have just generic
8 notice pleading. And I just can't conceive of your not needing
9 to amend the complaint ultimately.

10 Now, the timing of that is another matter and
11 something you-all could more concretely discuss. But --

12 MR. CROSS: Your Honor, if I may propose, speaking
13 for our clients, I don't have an objection to amending the
14 complaint. The only objection we have ever had -- and Your
15 Honor will recall we went through this last spring -- is -- and
16 I suspect why they really wanted an amended complaint because
17 they are on notice of what our positions are -- is it triggers
18 a whole new round of motions to dismiss, and they are going to
19 argue that there is a stay all over again.

20 If discovery moves forward from this day on, I'm
21 happy to put in however many amended complaints we need so that
22 this argument finally goes away. That is our only concern.
23 And so we could get an amended complaint within two weeks, I'm
24 sure, that lays out whatever needs to be laid out on a system
25 that's actually not even adopted, which is a little weird. But

1 we can do that. But discovery needs to be moving forward.

2 That is the sole bottom line. If they want to file a
3 new motion to dismiss, have at it. But discovery moves
4 forward. I mean, again, we won at the Eleventh Circuit. There
5 is only one ground in this case to stay. That is immunity.
6 And the Eleventh Circuit -- I was there. It was a hostile
7 reception, Your Honor. And this has always been about nothing
8 more than delay. And that is what we're seeing again today.

9 So we will take -- we will proceed however Your Honor
10 thinks is best. An amended complaint, fine; motion to dismiss,
11 fine, as long as discovery is moving forward and we get to file
12 a new preliminary injunction motion and we get the relief that
13 we, I think, showed we were entitled to last year now that we
14 are no longer under the time pressures of a major election.

15 MR. RUSSO: Your Honor, I mean, with all due respect
16 to Mr. Cross because I know he didn't start out in the case
17 originally -- there have been quite a few parties and attorneys
18 on the other side of the room that have exited stage left as
19 this case has gone on -- we're on the third amended complaint.

20 And, quite honestly, if the complaint is that any
21 voting system the state has is unconstitutional, when does this
22 case ever end? I mean, that is just -- that is a problem from
23 the start.

24 But putting that aside, Your Honor -- and I may be --
25 I may have this wrong. So somebody will need to correct me I'm

1 sure. You can. But looking through the docket, it looked like
2 there were two issues that were never addressed that were still
3 on the table regarding res judicata and collateral estoppel.

4 I don't know where those sit now. But to the extent
5 that discovery was stayed due to the appeal, you know, those
6 two issues on the motion to dismiss have yet to be responded
7 to.

8 THE COURT: It hasn't come back that long. Believe
9 it or not, as important as elections are, I do have some other
10 cases.

11 MR. RUSSO: And, you know, I don't necessarily know
12 where we stand even on those issues, quite honestly. But I do
13 know that, you know, this Court has rules. And local rules do
14 provide for the time for an answer to be filed and when
15 discovery begins.

16 MR. BROWN: Judge, a couple of --

17 THE COURT: Would you come next to the microphone.
18 Thank you.

19 MR. BROWN: Just a couple of points to -- Your Honor
20 said that upon remand you would insist upon expedited
21 proceedings. And that is the way we're prepared to move.
22 There's a couple of ways that the scheduling could be
23 expedited. One would be to -- this is a little bit like what
24 Mr. Cross said but not to have back -- different phases sort of
25 end to end with one not starting until the one before that is

1 finished.

2 So, for example, they complained about sort of
3 mootness-related issues on the DREs like, well, is it really
4 that important. That is a response to our motion for
5 preliminary injunction that they can put -- if they have a
6 problem, they can put it in there. They don't have to go
7 through a whole new motions process.

8 Also with respect to discovery, it is true that in
9 the typical case you answer and then you get into the
10 discovery. Well, they haven't answered yet even though the
11 complaints were filed years ago. But Your Honor has the
12 discretion to start discovery before the answer under the
13 rules. You don't have to wait. And so that doesn't need to
14 delay. So we don't need to wait on an answer to come in. We
15 should start. There is no reason -- there is no real reason to
16 not start discovery right now.

17 Thank you, Your Honor.

18 THE COURT: All right. Well, I know that y'all have
19 been giving a great deal of thought to this since the Eleventh
20 Circuit ruled. And I need to process the information and your
21 points that you have articulated today. And we'll try to get
22 back to you at least within the week about how I think we
23 should proceed.

24 I know that there are members of the public here who
25 always want to know what does the Judge think, what is she

1 going to do now.

2 MR. BROWN: So do we, Judge.

3 THE COURT: And so does counsel and so do our public
4 officials who are responsible for running the elections. So I
5 respect that. And at the same time, I don't have an election
6 next week or four weeks from now. If you-all can't tell me
7 that there's SPLOSTs in this next month, then I don't have -- I
8 don't have the monster breathing down my neck quite this way.

9 So it is probably more important for me to be
10 thoughtful about this and to consider what everyone has said
11 than to just speak at this point about something that I'm just
12 trying to process. It is a complicated posture the case is in.

13 And I understand the viewpoint argued by Mr. Russo.
14 We can't just be doing this forever. And the case goes back to
15 2017. I do understand that viewpoint. At the same time,
16 obviously this is a hot issue of concern to everybody and it
17 is -- and I have to deal with it still. And the fact that the
18 case dates back to then doesn't answer the problem that there
19 are serious issues involved.

20 And I certainly hope that the process of -- the RFP
21 process still is a very serious one. I don't know who the team
22 is. It is not -- that is not mine to be involved with. And I
23 don't know the breadth of issues. I do think it would be
24 helpful for me to have a copy of the RFP as well. Not that
25 that is going to answer all of my questions by any means. But

1 at least I'll understand what that is and not just have little
2 morsels of information.

3 MR. RUSSO: It is not the RFP. It is the key places.

4 THE COURT: Does the state believe that the five
5 identified vendors are likely, in fact, to bid on this, or are
6 there additional ones as well?

7 MR. RUSSO: We'll have to defer to our client.

8 MR. TYSON: Your Honor, we believe there were four
9 vendors that attended the bidders' conference. So I don't know
10 if that covers all of the ones. But there were several vendors
11 that are looking to bid it looks like.

12 THE COURT: All right. And you'll know who is -- is
13 it public at the point that the bids are submitted on
14 April 23rd who the bidders are or who attended the bidding
15 conference?

16 MR. RUSSO: Your Honor, we can follow up with you and
17 let you know. We do some procurement work. But I do not know
18 off the top of my head. My partner, Josh Belinfante, might be
19 able to shed some additional light on that.

20 MR. BELINFANTE: Typically, Your Honor, under the
21 procurement that this rule is governed under, anything that
22 goes into the procurement will remain confidential and
23 privileged until it is over. I know you know that from your
24 school board days. But in terms of the identity, that may be
25 something that is a more limited nature.

1 THE COURT: That is all I was asking about. Because
2 since they identified three systems that used some type of bar
3 code and two that didn't, I was just trying to figure out
4 what -- I don't really care about the name. I'm just trying to
5 figure out what their technology is and whether you are going
6 to have a full array of whatever is available and in those
7 terms or whether you are going to have something else
8 additional.

9 MR. BELINFANTE: Right. To that point, it may be
10 something that we could get you an answer on. I notice that
11 the filing that was made today -- we were planning to respond
12 post-hearing. And if the Court would indulge us at the latest
13 Monday, if we could submit a response to that, we could include
14 an answer to that question to the extent that we would be able
15 to have one.

16 THE COURT: Well, today is Tuesday. I can give you
17 until Thursday.

18 MR. BELINFANTE: Then that is when we will have it
19 in. Thank you, Judge.

20 THE COURT: All right. Very good. Thank you,
21 everybody. We'll try to get you something by Friday or Monday,
22 depending on what is filed.

23 All right. Thank you.

24 MR. CROSS: Thank you, Your Honor.

25 COURTROOM SECURITY OFFICER: All rise. This court is

1 in recess.

2 (The proceedings were thereby concluded at 4:09

3 P.M.)

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 64 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 11th day of April, 2019.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT